

**Supreme Court of the United States Chance to
Reinstall Confidence in American Elections**

White Paper

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Introduction

The Supreme Court of the United States (SCOTUS) has a chance to reinstall confidence in American elections. Based on two cases pending review, this White Paper explores the authority that non-legislative bodies—*i.e.* executive branch officials and the media—can have on election administration, integrity, and outcomes.

The unique opportunity pending before SCOTUS in one case involves the doctrine of separation of powers between the three branches of U.S. government. SCOTUS should address recent actions by state election officials that have permitted votes outside the law to be counted, and bring certainty to the limits of authority that executive branch officials have in crafting rules and procedures that govern election administration. In the second case, if SCOTUS grants certiorari, the Court will decide whether the media is guaranteed practical immunity for publishing misleading or false information that influences elections by weighing the proper balance between freedoms of the press and speech under the First Amendment and the right to a civil jury trial under the Seventh Amendment.

SCOTUS Review is Appropriate and Necessary

The sometimes-graying line between the roles of the judiciary and law-making bodies is often characterized by the phrase “legislating from the bench,” whereby a court issues a binding decision that, in effect, creates law. Technically the judicial branch interprets the law, but its application often has law-making effects. Nevertheless, in cases of a controversy the appropriate role of the judiciary is to interpret and apply the relevant law to a situation and reach a decision that resolves the conflict and guides future actions in adherence to that law.

Given the outstanding questions of executive authority to fill gaps when a law is silent or to create rules that go beyond what a law expressly provides, SCOTUS review of this oft-used executive agency authority may lessen the divisiveness in American politics.

Likewise, with major media companies now operating in global markets, the impacts of widespread inaccurate or false information about a candidate can be detrimental both to candidates' chances of success and voters' right to be informed with the truth. SCOTUS review of the standard by which the media can be held accountable for actions that can impact election outcomes is necessary if we are to restore confidence in American elections. Voters want and deserve elections to be decided on policies, not processes.

***Loper Bright Enterprises v. Raimondo*: How Much Deference Should Executive Agencies Receive When Filling Statutory Gaps**

When a question arises that is not answered by written law, do non-legislative government officials have the authority to fill that statutory gap? Or are such actions by government officials *ultra vires* and thus beyond their authority?

In *Loper Bright Enterprises v. Raimondo*, SCOTUS will reconsider its ruling in the landmark case *Chevron v. Natural Resources Defense Council*, which summarily held that federal agencies receive deference when interpreting certain unclear statutes or making regulations. This principle—executive branch authority to fill statutory gaps—was at the forefront of post-2020 election litigation that challenged election officials' unilateral actions to relax or violate state election laws.¹ In some cases, courts have found that election officials abused their limited executive authority, which may have impacted election outcomes.

For example, in *Teigan v. Wisconsin Election Commission, et al.*, the Wisconsin Supreme Court found that in the 2020 election, the Wisconsin Election Commission exceeded its “carefully regulated” executive authority by unlawfully allowing ballot drop boxes not authorized by law. In *Ball v. Chapman*, the Pennsylvania Supreme Court found the Pennsylvania Secretary of State's relaxation of the commonwealth's absentee rules in the 2022 election, based on covid-era policy changes, was beyond executive authority and contrary to law.

As in sports, if one changes the rules during a game, their chances of winning increase. By changing the rules by which elections are administered under an executive assumption of quasi-legislative power, the body of laws crafted by representatives of the people is diminished.

¹ In *Texas v. Pennsylvania, et al.*, 141 S.Ct. 1230 (2020), the State of Texas filed a motion for leave to file a bill of complaint against the states of Georgia, Michigan, Pennsylvania, and Wisconsin, on the grounds that those states' election procedures in the 2020 election were unlawfully modified by executive—not legislative—actions, which may have impacted the outcome of the presidential election. SCOTUS dismissed the case for lack of standing.

In several states, including the two cited above, it is a fact that recent elections included votes that came in “outside the law” due to non-legislative officials assuming power that was not expressly prescribed by their state legislatures. As a result, voters’ confidence has been reduced because of differences of opinion on whether votes cast outside the law should be counted.

SCOTUS can now expand on its holding in *West Virginia v. EPA*² by determining whether filling a statutory gap is the province of state legislatures and, more specifically, confirming that it is the role of lawmaker, not executive agencies, to enact the laws that have a major impact on our society.

The *Loper Bright Enterprises* case could ultimately be applied in the election context. The clearest nexus is the Election Clause of the U.S. Constitution at Article 1, Section 4, which provides that the times, places and manner of holding elections shall be prescribed by state legislatures. If SCOTUS rules that the agency exceeded its authority, the reasoning will be instrumental in future deliberation about executive authority to amend or relax laws governing election administration.

***Blankenship v. NBCUniversal, LLC, et al.*: Candidate and Public Rights to the Whole Truth Versus the Media’s Practical Immunity**

Another significant case pending before SCOTUS is a West Virginia defamation case, *Blankenship v. NBCUniversal, LLC, et al.* The petitioner, Don Blankenship, is one of West Virginia’s most well-known coal industrialists. Blankenship contends that his 2018 campaign for U.S. Senate was tanked by an alleged conspiracy between powerful public officials and national media companies who published mis- and disinformation on the eve of his primary election by calling him a “felon” and accusing him of being guilty of “manslaughter.”

According to news reports, the Blankenship campaign had come from behind when he announced his candidacy to leading in at least one poll heading into the voting period.³ However, Blankenship’s petition alleges that public officials colluded with media and big tech to publicly attack his campaign just days before the election. Blankenship lost his primary election bid.

² In *West Virginia v. Environmental Protection Agency, et al.*, 597 U.S. ____ (2022), SCOTUS held, in part, that the federal EPA exceeded its executive authority by promulgating a regulation under an assumption power relying on a “long-extant, but rarely used, statute designed as a gap filler . . . to adopt a regulatory program that Congress had conspicuously declined to enact itself.”

³ See, e.g., Alex Isenstadt, *Blankenship surging on eve of West Virginia Senate primary*, Politico, May 5, 2018; <https://www.politico.com/story/2018/05/05/blankenship-polls-west-virginia-senate-primary-570752> (last visited June 1, 2023).

Blankenship's claim is that his precipitous fall was a direct result of mis- and disinformation deliberately published to thwart his campaign for U.S. Senate. Rather than being a felon and a murderer as he was described by some public officials and the media, Blankenship was found guilty of only a misdemeanor. In fact, he was found not guilty of the three felony charges brought against him, none of which included murder or manslaughter. Any due diligence or fact-checking would have readily revealed the truth of the matter.

In 2019, a federal judge recommended that Blankenship's misdemeanor conviction be overturned after finding that the government withheld exculpatory evidence that may have exonerated Blankenship. Despite that recommendation, an appeals court disregarded the judge's opinion. Regardless, the judge's recommendation came too late for then-candidate Blankenship to combat the mis- and disinformation during his election.

At the core of *Blankenship* is the media's seemingly blanket immunity protection that comes from the 1964 case *New York Times Co. v. Sullivan* and its progeny, which requires proof of "actual malice" on the part of the media after making false statements about a public official. According to the *Blankenship* petition, he was never given a chance to present evidence at trial because a federal court entered summary judgement in favor of the media companies. On appeal, the Fourth Circuit affirmed the district court's ruling, summarily finding that the media practically has the right to be dishonest, drag its feet on issuing corrections, or otherwise cannot be held accountable for not conducting sufficient research before publishing half-cocked stories.

Ultimately, Blankenship seeks his day in court to present his evidence of a conspiracy between public officials and the media whose efforts may have influenced his election.

Were the Court to agree with Blankenship, the decision would give candidates an actual opportunity to plead their case to a jury when seeking to hold the media accountable, rather than the current common result of having a judge deny that opportunity by entering summary judgement. To deter media coverage without adequate research and accurate reporting, SCOTUS should act promptly to send a message that irresponsible reporting on elections has consequences.

The Durham Report: Using Negative Influence to Meddle in Elections

Special Counsel John Durham's recently released report details the results of his multi-year investigation into outside forces meddling in American elections.⁴ He opines that democracy has been under attack since 2016, when Russia targeted the United States with disinformation psychological operations for the purpose of improperly influencing the American presidential election.

The Durham Report also revealed that then-presidential candidate Hillary Clinton's campaign generated mis- and disinformation for the purpose of misleading the American people to influence the outcome of the 2016 presidential election.

Since then, Americans' interests in election laws and procedures have grown significantly, while confidence in elections has diminished. In retrospect, the past several federal elections have shown that disinformation, when unchecked or done in collusion with media and big tech, may be unstoppable. With the major impacts that these negative influence tactics have on free and fair elections, it seems that only SCOTUS action at this point will curtail these practices from continuing.

Truth Matters and Timing is Decisive

I recently testified before Congress and expressed my strong contempt over the recent discovery that the 2020 Biden campaign fabricated a letter saying Hunter Biden's laptop had all the indicia of a Russian disinformation operation. According to the U.S. House Judiciary Committee,⁵ the letter penned by 51 former intelligence officers at the behest of the Biden campaign was intentionally false, generated to give then-candidate Biden a talking point in an upcoming debate. Biden did, in fact, cite the letter in the debate as a way to debunk the assertion that the evidence in the laptop was real.

Emails and other records made public by the U.S. House Judiciary Committee between the Biden campaign and intelligence operatives show in no uncertain terms that the intent and timing of the letter was designed to improperly influence the outcome of the election. Once news broke that the letter was fabricated, a post-2020 election survey cited by members of the U.S. House Oversight Committee suggested that there were enough swing-state voters who would have voted differently in 2020 to change the presidential

⁴ U.S. Dept. of Justice, *Report on Matters Related to Intelligence Activities and Investigations Arising Out of the 2016 Presidential Campaigns*, May 12, 2023; <https://www.justice.gov/storage/durhamreport.pdf> (last visited June 1, 2023).

⁵ Committee on the Judiciary, U.S. House of Representatives, *The Hunter Biden Statement: How Senior Intelligence Community Officials and the Biden Campaign Worked to Mislead American Voters*, May 10, 2023; https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023-05-10_the_hunter_biden_statement_how_senior_intelligence_community_officials_and_the_biden_campaign_worked_to_mislead_american_voters-sm.pdf (last visited June 1, 2023).

election outcome had they known the truth about various scandals surrounding Biden before the election.⁶

How can we protect the integrity of our elections when the truth takes so long to come to light?

False Information Impacts Voter Choice

Why these cases are so important is because elections take place under strict timeframes. The “October surprise” tactic is a familiar strategy used by political opponents shortly before election day. The intent is to launch one last negative campaign to influence voter choice, and to do so in such a manner that the subject candidate has little to no time to react. As an election draws near, the public has less time and ability to research last-minute accusations about a candidate. The damage to candidates is exasperated when it is widespread by the media.

Several studies, including an in-depth analysis published in 2014 in the *International Journal of Public Opinion Research*, found that spreading false negative rumors about a candidate is related to significant decreases in the likelihood of voting for that candidate.⁷ Another study on the 2016 presidential election published in the *Journal of Experimental Psychology* found that not only does mis- and disinformation impact election outcomes, but the public is also more likely to believe inaccurate information when the media publishes it multiple times.⁸

Conclusion

The cases pending before SCOTUS may very well impact how much power and influence non-legislative actors can have on election integrity and outcomes. If campaigns collude with otherwise trustworthy entities, public figures, and big tech to misinform to the American people without consequence, we can expect such shenanigans to continue.

⁶ Media Research Center, *Biden Voter Messaging Survey Analysis*, November 2020; https://cdn.mrc.org/TPC-MRC+Biden+Voter+Messaging+Survey+Analysis+Nov+2020_final.pdf (last visited June 1, 2023). Note that this survey, like most, has received some scrutiny for its methodology and polling question phrasing. *See, e.g.* Glenn Kessler, *Lawmakers cite fishy poll to suggest laptop would have swayed vote*, *Washington Post* (February 21, 2023); <https://www.washingtonpost.com/politics/2023/02/21/lawmakers-cite-fishy-poll-suggest-laptop-tale-would-have-swayed-vote/> (last visited June 1, 2023).

⁷ Weeks, B.E., & Garrett, R. K. (2014). *Electoral Consequences of Political Rumors: Motivated Reasoning, Candidate Rumors, and Vote Choice During the 2008 Presidential Election*. *Internal Journal of Public Opinion Research*, Vol. 4, No. 4, 401-422; <https://par.nsf.gov/servlets/purl/10013134> (last visited June 1, 2023).

⁸ Pennycook, G., Cannon, T. D., & Rand, D. G. (2018). *Prior Exposure Increases Perceived Accuracy of Fake News*. *Journal of Experimental Psychology: General*, 147(12), 1865–1880; <https://psycnet.apa.org/manuscript/2018-46919-001.pdf> (last visited June 1, 2023).

Likewise, if public officials can change election rules in the middle of the game, we can no longer expect truly fair elections. And, if the media is allowed to pick and choose when it wants to report the whole truth, then public confidence in the integrity of elections will continue to diminish and the very fabric of our democracy will unravel.

SCOTUS must act on these cases and give the nation the clarity it needs. Our democratic republic may depend on it.